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IN THE

Supreme Court of the United States

October Term, 1955

No.

DULIEN STEEL PRODUCTS, INC., *Petitioner,*

v.

ELBERT B. CONNELL, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Dulien Steel Products, Inc. prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana entered in the above entitled cause on December 12, 1955.

OPINIONS BELOW

The opinions of the trial court (App., p. 1a) and the Supreme Court of Louisiana (App., p. 4a) are unreported.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered December 12, 1955. The timely motion of Dulien Steel Products, Inc. for rehearing was de-

nied January 16, 1956. On January 26, 1956, petitioner filed its motion to recall and remand case to the lower court for correct computation of the amount due, which motion was denied on February 21, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

Respondent sued petitioner, by whom he had been formerly employed as a night watchman at a monthly salary of $225.00, for overtime pay upon the claim that the time he slept on his employer's premises was compensable as overtime. The State Court of Louisiana rendered judgment in his favor for $22,229.56, plus an attorneys' fee of $1,000.00, plus interest. The period for which overtime compensation was awarded was slightly less than 23 months (97 weeks). During the same period, respondent earned and was paid $5,036.00 as his regular compensation. Approximately $7,000.00 interest has accrued, so that the total judgment to date aggregates $30,000.00, thus adding to respondent's monthly salary of $225.00 the additional monthly sum of $1,339.00 as overtime compensation for sleeping on petitioner's premises. This unconscionable situation essentially results by failing to give effect to respondent's sleeping time in converting his monthly salary of $225.00 to an hourly rate in order to compute the statutory regular rate of pay upon which judgment for overtime was calculated. Upon the foregoing facts, two questions are presented:

1. Is a judgment in a State court for overtime pay under the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)) valid which allows overtime compensation to a night watchman employed at a monthly salary

wherein no effect was given to respondent's compensable sleeping time in converting his monthly salary of $225.00 to an hourly rate in order to compute the statutory regular rate of pay upon which the judgment for overtime is calculated?

2. May a judgment for overtime entered pursuant to Section 16(b) of the Fair Labor Standards Act of 1938 validly grant interest from the date of filing the complaint in addition to the penalty authorized by Section 216(b)?

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U.S.C. 201 et seq.) are set forth in Appendix B. infra, pp. 6a-7a).

STATEMENT

This is an action commenced January 16, 1952 by respondent in the State courts of Louisiana for overtime compensation pursuant to Section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)). Petitioner, during the period involved, was engaged in the liquidation and dismantling of a surplus gasoline plant located at Cotton Valley, Louisiana, under contract with the War Assets Administration (R. 3, 7). Respondent was employed by petitioner as a night watchman during the course of the liquidation at a monthly salary of $225.00 per month (R. 7). Respondent utilized approximately 30 hours per week in actively discharging his duties, the remainder of the time for which he claimed compensation being so-called sleeping time. (R. 140)

The principal issue was whether the time respondent spent on the plant premises other than the time required to perform his duties, his so-called "sleeping time", was compensable. Upon trial this issue was resolved in favor of the respondent (R. 78, 80).

The court did not calculate the amount of the judgment which its ruling required (R. 81). Instead judgment was entered upon a stipulation filed by Counsel which stated, inter alia, that they:

> "have calculated the amount of the judgment required by the opinion and have agreed that such amount is Twenty-two Thousand Two Hundred Twenty-nine and 56/100 ($22,229.56) Dollars." (R. 85)

On June 11, 1954, a judgment was entered pursuant to that stipulation for:

> "TWENTY-TWO THOUSAND TWO HUNDRED TWENTY-NINE AND 56/100 ($22,229.56) DOLLARS, plus an attorneys' fee of One Thousand and No/100 ($1,000.00) Dollars, with legal interest from judicial demand and all costs of this suit". (R. 83)

Accepting as correct the computation of Counsel embodied in the foregoing stipulation for judgment, petitioner appealed the decision to the Supreme Court of Louisiana solely on the ground that the trial court erred in finding that the respondent was entitled to additional compensation for this so-called sleeping time. On December 12, 1955, the Supreme Court of Louisiana affirmed. The opinion adverted to the prior agreement of Counsel as to the correctness of the amount of the judgment. (App. 5a)

On December 22, 1955, petitioner filed a timely application for rehearing which was denied January 16, 1956.

On January 19, 1956, present Counsel for petitioner discovered that the stipulation for judgment, wherein Counsel for the parties had computed the amount ostensibly due respondent as $22,229.56, was erroneous in that their computation of the workweek, necessary to effect the required conversion from a monthly salary to an hourly rate in order to arrive at the statutory regular rate of pay, wholly omitted to include the sleeping time which the court had held to be compensable. The resulting difference due to this unwitting error is startling. Instead of a total judgment of $22,229.56 (without interest), the judgment including penalty should have been, if properly calculated, $4,812.20. This error was immediately called to the attention of Counsel for both parties. At the same time it was pointed out that the entry of judgment in the form usually employed in Louisiana mistakenly allowed interest in addition to penalty and attorneys' fees.

On January 26, 1956, petitioner filed a motion in the Supreme Court of Louisiana to recall the decree and remand for correct computation of the amount due. Petitioner's motion was denied, without opinion, on February 21, 1956.

REASONS FOR GRANTING THE WRIT

The principal reasons for granting the writ are twofold:

1. The Supreme Court of Louisiana Has Decided a Question Under the Fair Labor Standards Act, Whose Construction and Application is Wholly Controlled by Federal Law, in a Manner Directly in Conflict With Applicable Decisions of This Court

(a) The judgment below is based upon an incorrect computation of the employee's regular rate of pay. This Court has held that the Fair Labor Standards Act requires an hourly rate as a basis for computing overtime, and has specifically prescribed the formula to effect the necessary conversion from a weekly or monthly rate to an hourly rate in order to arrive at the basic regular rate of pay for the computation of compensable overtime. This is accomplished, the Court has held, by dividing the weekly rate of pay by the *total number of hours compensable* in any week. The resulting quotient is the hourly rate, which becomes the base hourly rate for the computation of overtime pay. *Overnight Motor Transport Co.* v. *Missel*, 316 U.S. 572, 579-580 (1941); *Walling* v. *Halliburton Oil Well Cement Co.*, 331 U.S. 18, 23 (1946); *Bay Ridge Operating Co.* v. *Aaron*, 334 U.S. 446, 460-462 (1947). The judgment of the State court failed to follow this formula. If it had, the judgment would have been $4,812.20 instead of $22,229.56.

(b) The judgment below allowed interest on the amount awarded respondent for overtime, including penalty. This was incorrect. This Court has unequivocally held that interest is not allowable in a Fair Labor Standards Act case where the judgment includes a penalty. This, of course, is upon the premise that authorization by Congress for the imposition of a penalty is in lieu of any damage which claimant might otherwise assert by virtue of a delay in payment for which

interest is normally given. *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697, 714-716 (1944). That case is likewise authority for the proposition that the question is one of Federal and not local law, so that the statute applicable in Louisiana upon which interest is allowed as of course from the "date of judicial Demand" is not applicable to a case controlled by the Fair Labor Standards Act.

2. The Omission to Apply the Law of the Case as Prescribed by This Court Has Resulted in an Unconscionable Judgment Against Petitioner Which This Court in the Interest of Justice Ought to Correct

It is respectfully suggested that to permit the judgment to stand in the face of the gross and palpable errors with which it is infected would constitute a gross miscarriage of justice. The Fair Labor Standards Act was never intended to impose what is tantamount to a penalty of more than ten times the additional compensation for which petitioner is actually indebted to respondent.

CONCLUSION

It is respectfully submitted that the decision of the Supreme Court of Louisiana is so squarely in conflict with the decisions of this Court as to justify summary reversal, *Securities & Exchange Commission* v. *Otis & Co.,* 338 U.S. 843; *Ewing* v. *Gardiner,* 341 U.S. 321; and remand with instructions to recompute the judgment in conformity with the decisions of this Court. *Busey* v. *District of Columbia,* 319 U.S. 579. Indeed, on a petition for writ of certiorari to the Supreme Court of Ohio in the case of *J. Monroe Floyd* v. *The Du Bois Soap Co.,* 317 U.S. 596, this Court granted

the writ and reversed the judgment on authority of *Overnight Motor Transport Co.* v. *Missel,* supra.

All of which is respectfully submitted.

IRWIN GEIGER,
PAUL R. HARMEL,
MICHAEL A. SCHUCHAT,
Attorneys for Petitioner.

GEIGER AND HARMEL
Of Counsel.

March 28, 1956.

APPENDIX A

26TH JUDICIAL DISTRICT COURT
WEBSTER PARISH, LOUISIANA

No. 16,333

ELBERT B. CONNELL

v.

DULIEN STEEL PRODUCTS, INC.

Opinion

The facts of this case are amply covered by the statement of the case, contained in the briefs filed by counsel for both plaintiff and defendant herein. However, in order to briefly outline same, I will state that this is a case arising under Fair Labor Standards Act of 1938, as amended. The plaintiff was a nightwatchman in a plant owned by Reconstruction Finance Corporation, located near Cotton Valley, Louisiana. The plant had been sold to the defendant under a contract, which obligated them to liquidate the plant and divide the proceeds in liquidation with the Reconstruction Finance Corporation on the basis set forth in the contract, which was filed in evidence during the trial of the suit. During this period of liquidation, the defendant was required to post a bond and it is my opinion that the Reconstruction Finance Corporation also maintained certain supervision over the property during the liquidation, because it was certainly to their interest to do so.

Plaintiff alleged that he worked more than forty (40) hours a week and was not paid overtime pursuant to the Fair Labor Standards Act.

The defendant claims that the plaintiff was not employed for more than forty (40) hours per week and hence was not entitled to any overtime payment.

It was admitted that the plaintiff's employment was one subject to the Fair Labor Standards Act and it was stipulated that he was employed on a basis of a thirty (30) hour week and at a monthly salary of $225.00. The plaintiff admitted during the trial of the case that when he was first employed, he was told that his sole duties would be to turn on the lights at the plant when dark fell, to make four rounds of the premises each night, and to cut off the lights when daylight came. He further admitted that each round he made required an average of forty-five (45) minutes, so that on the basis of his original employment he would spend approximately 3¾ hours in the performance of his duties each night.

Plaintiff claims, however, that a week or ten days after his employment began, Mr. Barash, a representative of the defendant company told him that a government inspector had been there and checked his work and that he would be required thereafter to stay on the place all night and that it would also be necessary for him to make five (5) rounds each night and to punch the clock on each such round. As I appreciate the case, this is the controlling issue, for the plaintiff through his counsel admitted during the trial that he had no case if he was not required to be on the premises between such rounds and the defendant likewise admitted that if plaintiff was required to stay on the premises between rounds he had a valid cause of action under the Act for all time worked by him in excess of forty (40) hours per week.

On this crucial point, the testimony is in hopeless conflict, in that Mr. Barash, Mr. Geiger and Mr. Rosenwald, all officers or employees in a supervisory capacity of the defendant company, emphatically contradict the plaintiff's testimony on this point.

Because of the nature of this case and the quantum to be allowed the plaintiff, in the event of recovery, I have given a great deal of study to the transcript of testimony and the

briefs filed herein and paid particular attention to the demeanor of the witnesses, while testifying in court. It is always an unpleasant duty for the trial judge to arrive at the correct statement of facts, where there is such a direct contradiction, as in the case under consideration. In such a case, I think, it is the duty of the Court to take the most reasonable contention, after listening to all of the other evidence in the case and after taking into consideration the interest of the various witnesses in the outcome of the trial. I am compelled to take the plaintiff's version as being the true facts of the case. He impressed me during the trial of the case as being an humble and truthful witness. He truthfully stated that the reason he did not make a claim for overtime wages, until his employment was terminated, was because he thought he would be fired and that at his age he needed the employment no matter how many hours he worked or how much he received for his labor. The various officers, who testified for the defendant company, on the other hand, did not impress me with their sincerity. They appeared to be well versed in the requirements of the law and were under the impression that their contract of employment with the plaintiff herein would be a way to evade the coverage of the federal statute in question. It is impossible for me to believe that they expected the plaintiff to make five (5) rounds of the plant each night and to punch the clock on such rounds and yet have the intervening time as his own. Mr. George, who was a representative of the Reconstruction Finance Corporation at the time of plaintiff's employment, fortifies my conclusion on this point, by testifying that it was his impression that Mr. Connell was on duty during all of the night hours. In fact, he testified that if he had not thought such was the case, he would have reported same to his superiors. I am of the opinion that a watchman was required to be on duty at all hours of the night and that the defendant company knew this, but were merely trying to employ the plaintiff on an hourly basis for the hours actually worked from a technical viewpoint, when actually they knew that he would be there all

hours of the night. In other words, it is my painful duty to say that I believe the defendant company was purposely trying to evade the law and using the plaintiff in so doing. Having arrived at this conclusion, it is unnecessary for me to go into the cases cited in the briefs, for it is admitted by the defendant that, if the plaintiff's employment required him to be on the job all night, they owed him overtime payment.

Neither the brief filed by the plaintiff, nor the defendant herein, have discussed very extensively the quantum that plaintiff should recover. For this reason, the opinion rendered herein will not go into that matter. Based on this opinion, if counsel for plaintiff and defendant cannot agree on the amount, I will pass on that at a later date, after having received a brief on that question alone.

This opinion rendered officially at Minden, Louisiana on this 6 day of April, 1954.

JAMES E. BOLIN
Judge

Monday Dec 12 1955

SUPREME COURT OF LOUISIANA

No. 42,012

ELBERT B. CONNELL

v.

DULIEN STEEL PRODUCTS, INC.

On appeal from the Twenty-sixth Judicial District Court in and for the Parish of Webster, State of Louisiana, Honorable James E. Bolin, Judge.

PONDER, *Justice.*

In this suit the plaintiff seeks to recover overtime pay, liquidated damages, and attorney's fees under the provi-

sion of the Fair Labor Standards Act for services rendered as a night watchman while employed by the defendant. The defendant answered the suit alleging that the plaintiff was not employed for more than 40 hours per week and was not, therefore, entitled to overtime pay. The case was tried in the district court and the plaintiff was awarded judgment in the amount of $22,229.56 and $1,000.00 for attorney's fees. The defendant has appealed.

The only question presented in this case is whether or not the plaintiff, under the contract of employment, was required to remain on the premises throughout the night. Counsel have entered into an agreement that the amount awarded by the district court is correct if the plaintiff was required under his employment to remain on the premises overnight.

The plaintiff was employed as a night watchman in a plant owned by the Reconstruction Finance Corporation. The plant was sold to the defendant under a contract which obligated it to liquidate the business and divide the proceeds with the Reconstruction Finance Corporation on a basis set forth in the contract. The defendant was required to post bond during the period of liquidation and the Reconstruction Finance Corporation retained certain supervision over the property during the period of liquidation. When the property was transferred to the defendant, the plaintiff was retained as night watchman. The plaintiff testified that shortly thereafter a representative of the defendant company informed the plaintiff that a government inspector had been there and had checked his work and that the plaintiff would be required thereafter to stay on the premises all night and would be required to make five rounds each night and punch the clock after each round. The plaintiff's testimony was contradicted by three witnesses who were officers and employees of the defendant company, insofar as the plaintiff was required to remain on the premises throughout the night. The trial judge in

his written opinion states that he was not impressed as to their sincerity. The defendant's witnesses admitted that it was the duty of the plaintiff to arrive on the premises at sundown, turn on the lights, and check everything including the locks and the gates; that he was to make five rounds during the night and punch the clock at various stations; and to check the premises in the morning and turn off the lights. A representative of the Reconstruction Finance Corporation testified that the plaintiff was on duty during all the night hours and, if such had not been the case, he would have reported it to his superiors since, according to his understanding of government instructions given to him, the property was to be guarded at all times during the dark hours by the defendant company.

In light of this testimony and under the facts in this case, it is apparent that the plaintiff was required to watch the premises throughout the night and, such being the case, the plaintiff is entitled to overtime pay and attorney's fees.

For the reasons assigned, the judgment is affirmed at appellant's cost.

APPENDIX B

The Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U.S.C. 201, et seq.), provides in pertinent part:

Sec. 207.

"(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

* * * * *

Sec. 216.

"(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

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Office - Supreme C
FILE
APR 23
HAROLD B. WILL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 805

DULIEN STEEL PRODUCTS, INC., Petitioner

vs.

ELBERT B. CONNELL, Respondent

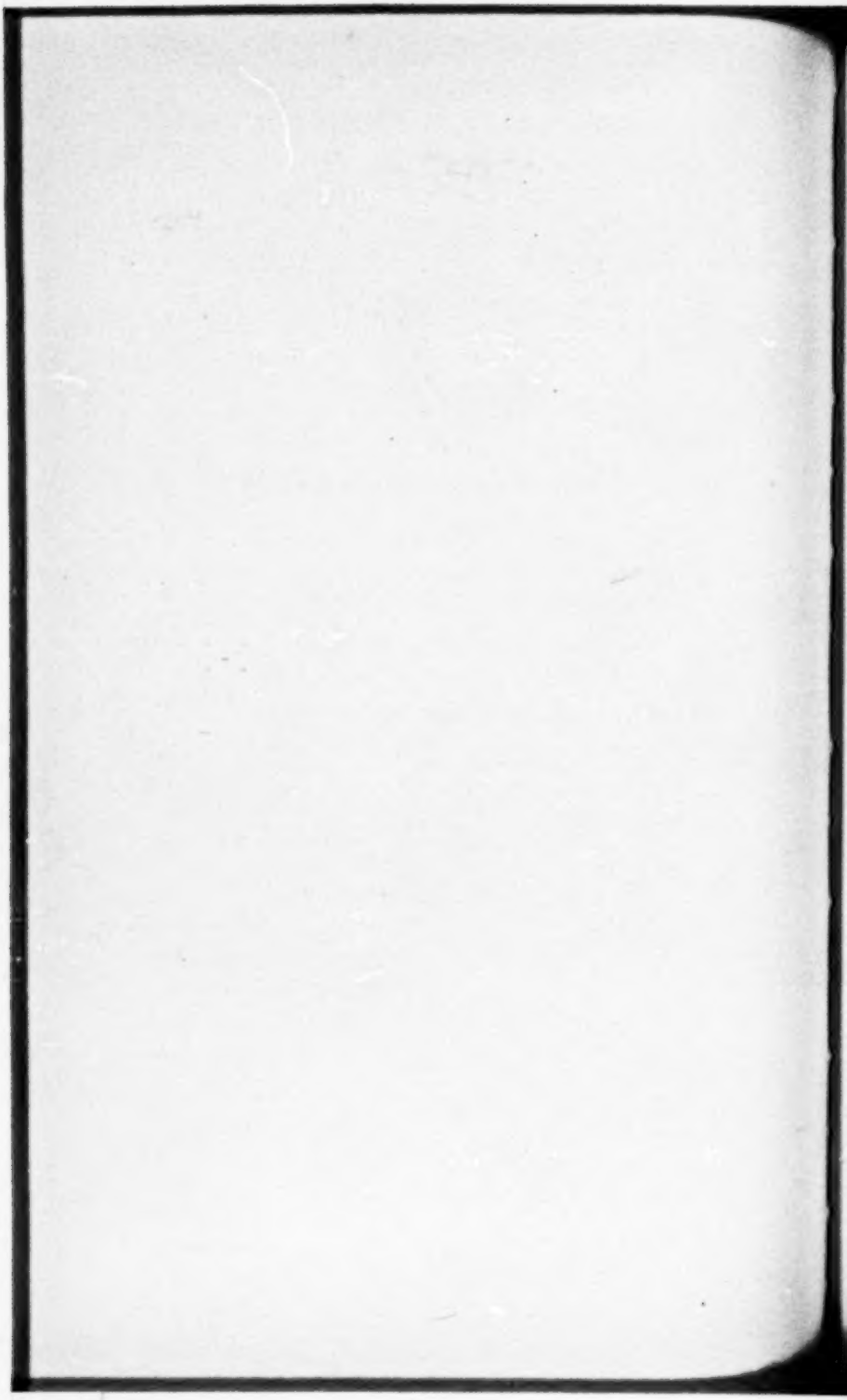
OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PHILIP H. MECOM
LEROY H. SCOTT, JR.
GEORGE J. DESPOT
H. DAN SAWYER
Second Floor
Louisiana Bank Building
Shreveport, Louisiana
Attorneys for Respondent

OF COUNSEL:

MECOM, SCOTT & DESPOT
Second Floor
Louisiana Bank Building
Shreveport, Louisiana

LECONTE, SHREVEPORT, LOUISIANA



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.

DULIEN STEEL PRODUCTS, INC., Petitioner

vs.

ELBERT B. CONNELL, Respondent

OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Elbert B. Connell prays that this Honorable Court refuse to grant a writ of certiorari to the Supreme Court of Louisiana to review the judgment of that court entered on December 12, 1955.

OPINIONS BELOW

The opinion of the trial court is as found in the appendix to petitioners brief (Pg 1a-4a) and in the record (R. 78-81). The opinion of the Supreme Court of Louisiana is reported at 85 So. 2d 3.

DATES OF ACTION BELOW

December 12, 1955—
Judgment rendered by Supreme Court of Louisiana.

December 23, 1955—
Application for rehearing filed by defendant.

January 16, 1956—
Rehearing denied by Supreme Court of Louisiana.

January 17, 1956—
Decree returned to trial court for execution.

January 27, 1956—
Defendant filed an untimely motion to remand.

February 21, 1956—
Motion to remand denied without written reasons.

JURISDICTION

Petitioner seeks jurisdiction under 28 U.S.C. 1257 (3). Respondent denies there is any jurisdiction under the statute cited because no federal question was decided by the trial court or the Supreme Court of Louisiana. The questions raised in petitioner's application were not timely or properly presented to the state courts. United States Supreme Court Rule 23(f), which requires that this be affirmatively shown, is totally ignored in petitioner's application.

STATUTE INVOLVED

There is no federal statute involved in the decisions of the trial court of the Louisiana Supreme Court. The entire case was submitted to those courts on an ad-

mission of coverage, a stipulation of quantum, and a disputed question of fact. This disputed question of fact was all that was decided by the state courts. See 85 So. 2d 3, where the Supreme Court of Louisiana stated:

> "The only question presented in this case is whether or not the plaintiff, under the contract of employment was required to remain on the premises throughout the night. Counsel have entered into an agreement that the amount awarded by the district court is correct if the plaintiff was required under his employment to remain on the premises overnight." (Emphasis ours)

The amount awarded by the district court was awarded pursuant to an earlier stipulation and was not argued or briefed below. (R. 85)

QUESTIONS SOUGHT TO BE PRESENTED FOR REVIEW

There are no federal questions properly presented for review. The case below was decided solely upon a question of fact. The questions sought to be presented by petitioner herein were never presented at all to the trial court and were presented to the Louisiana Supreme Court only after a rehearing had been denied and the judgment had become final and executory. Louisiana Code of Practice, Articles 911, 912 (App., p. 1a): *D'Apremont Vs. Peytavin*, 5 Mart. (O.S.) 641 (1818).

ISSUE ACTUALLY PRESENTED HEREIN

Will this court entertain a petition for certiorari when the issues sought to be raised therein were never presented to the trial or appellate courts and where the federal questions involved, if any, were never decided by said courts? To do so would be contrary to the rules of this court (Rule 23f) and to the hundreds of cases so holding. *Wilson vs Cook*, 327 U.S. 474, 483, wherein the court said:

> "In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the constitution with respect to which other questions are properly presented. People of State of New York ex rel Cohn vs. Graves, 300 U.S. 308, 317, 57 S. Ct. 466, 469, 81 L. Ed 666, 108 A.L.R. 721 and cases cited."

STATEMENT OF THE CASE

This case was originally brought under the wage and hour provisions of the Fair Labor Standards Act (R. 3-5) Defendant admitted in its answer the essential elements of employment and coverage by the act, but denied that plaintiff had worked overtime. (R. 7-9) Plaintiff was a night watchman who admitted that he was originally employed by defendant to be at the plant only at sundown and sunrise to turn the lights on and off and to make a couple of rounds during the night. (R. 89) After

the first twenty-nine days of employment he actually made five rounds of the plant each night (Pl. Ex. 2; R. 13, notes 2 and 3) and was physically present during the entire evening, night and early morning hours. His testimony was that he was instructed this would be required (R. 90) It was disputed as to whether this was *required*, but it was not disputed that such was actually the case.

In the trial court and in the Louisiana Supreme Court, defendant based its defense entirely on the novel contention that plaintiff was only required to be present during the actual time necessary to make a round of the watchman's station clocks (about 45 minutes for each round), that he had to do this only five times a night and that he was not employed or on duty in between these rounds (though he was actually physically present), that he only worked four or five hours a night, that he was only hired to work four or five hours each night (stipulated to be 30 hours per week—R. 141), that he was never told that he would have to stay on the premises between rounds, that he had been paid for his 30 hours per week and thus was not due any additional sums.

Defendant chose voluntarily to base its defense upon this factual question and the trial judge stated in his opinion,

> ". . . . I am of the opinion that a watchman was required to be on duty at all hours of the night . . ." (R. 80)

The trial judge did not decide the question of quantum, but instead stated,

> ". . . If counsel for plaintiff and defendant cannot agree on the amount I will pass on that at a later date, after having received a brief on that question alone." (R. 81)

The question of quantum was not argued or briefed for the trial judge as the record will show. Pursuant to his suggestions counsel for plaintiff and counsel for defendant got together, and after some measure of disagreement, finally agreed between themselves as to the proper amount to be awarded. Counsel then drew up the stipulation (R. 85) and judgment (R. 83) and presented the same to the trial judge for signature.

From the judgment defendant appealed and presented to the Supreme Court of Louisiana the same issues presented below, stipulating on oral argument that the amount of the judgment was not in dispute. The court recognized this stipulation in its opinion,

> "Counsel have entered into an agreement that the amount awarded by the district court is correct if the plaintiff was required under his employment to remain on the premises overnight." 85 So. 2d 3 (Emphasis ours)

There was definitely no attempt on the part of Dulien to raise the federal questions and issues sought to be presented on certiorari.

ARGUMENT

No federal question having been raised in the trial court or in the Supreme Court of Louisiana there is necessarily no jurisdiction for certiorari. This basic point of law has been amply recognized in hundreds of cases and has been codified in rule 23(f) of the Rules of this court.

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage of the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were acted upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exceptions, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." (emphasis ours)

The petition for certiorari ignores the above rule. It must ignore this rule because the issues sought to be raised here were never raised in the trial court at all and were presented to the Supreme Court of Louisiana only AFTER an application for rehearing had been refused and the judgment had become final and executory.

The Louisiana Supreme Court at that point refused to further consider the matter, without written reasons.

That rule 23(f) has authority in law is well settled. This court has repeatedly said that nothing is so well settled as that it is too late to try to raise a federal question for the first time in a petition for a rehearing after the final judgment of the state court of last resort. *Susquehanna Boom Company v. West Branch Boom Co.*, Pa. 1884, 3 S. Ct. 438, 110 U.S. 57, 28 L. Ed. 69. A fortiori, it is too late to first raise it AFTER the application for rehearing has been denied!

The rule requires an affirmative showing that the questions presented for review were timely and properly raised below in order to show jurisdiction. Petitioner's application absolutely fails to show this essential element of jurisdiction and the application should therefore be denied.

ALTERNATIVE ARGUMENT

Respondent believes that the above is a good and sufficient answer to the true issues presented by the petition for certiorari and in the event that the court agrees, there is no need to consume time by considering the remainder of this brief. The remainder is devoted to the proposition that even if the issues had been timely and properly raised, that there are still factors in the case that would in the event certiorari is granted, require briefs and argument. It is not nearly so well settled as

petitioner's application would have it appear and respondent wishes to indicate briefly the points that would need to be considered on oral argument and briefs, should the court disagree with our argument thus far. Ordinarily we would not feel it necessary to outline our possible future argument, but in petitioner's application the request is made for summary reversal! In view of the following points, that course would clearly not be in order:

FIRST:

It was stipulated at the trial (R. 141) that plaintiff was employed on the basis of a thirty hour week. This court has never held that the rule announced in *Overnight Motor Transport Co. vs. Missel*, 316 U.S. 572 was applicable to the case where an employee was hired and paid for a definite number of hours under an employment contract. The stipulation settled the number of hours and the hours for which he was paid.

SECOND:

In the contract between Dulien and the Government there is a provision which sets up the maximum number of hours for the computation of basic rates of pay in the situation where there is no employment contract for a lesser number of hours. (R. 43)

THIRD:

The position taken by Dulien throughout the case is inconsistent with its present position. Originally Dulien said, in effect, "Mr. Connell was only employed on the basis of a thirty hour week, he was paid for thirty hours

and is thus not entitled to more." The lower court and the Louisiana Supreme Court found that this was originally true, but that there was added to this basic contract agreement a large number of hours which Dulien admitted throughout had not been paid for. We feel that to allow such basic inconsistency is wrong and if certiorari is granted, we wish to argue the matter and present authority as the necessity arises therefor. Dulien now wishes to take the position that, even though they *said* throughout that this pay was only for the thirty hours, they now wish to make the computation upon a different number. No such issue was presented in the Overnight Motor Company case, supra and this case should not be decided under that authority.

FOURTH:

The record is totally devoid of information showing how the computation was made. Human experience, however, tells us that the final figure was the result of give and take and respondent frankly feels that he gave as much, or more, than he took. Whenever there is such a compromise it is to avoid all that is now taking place. We certainly feel that if the question of quantum is to be opened at all, it should be opened on both sides. For example, attorneys fees awarded in the judgment were pitifully small under the circumstances, and particularly when the appeal and the application for certiorari is taken into account. Respondent, however, feels that he made an agreement on the quantum and is bound thereby. We believe that the petitioner should be likewise bound. If

certiorari is granted, we definitely think that the matter should be argued, not summarily decided. In the petition for certiorari the computation does not even follow the formula urged in that petition, nor does it follow the contractual formula agreed to by Dulien in its basic contract with the government (R. 43).

FIFTH:

There is the question of the binding effect of the stipulation of quantum. Even if the case should be one that would otherwise fall into the Overnight Motor Company formula, which we deny, and should this court desire to take the time to consider quantum by granting certiorari, should there not be argument regarding the legal effect of this stipulation? When the highest court of a state specifically recognizes a stipulation in its written opinion there is certainly strong argument on state grounds for upholding the judgment based thereon. In this connection we specifically note Article 2291 of the Revised Civil Code of Louisiana, which provides:

> "The judicial confession is the declaration which the party, or his special attorney in fact, makes in a judicial proceeding.
>
> It amounts to full proof against him who has made it.
>
> It cannot be divided against him.
>
> It cannot be revoked, unless it be proved to have been made through an error in fact.
>
> It cannot be revoked on a pretense of an error in law."

This provision alone would be sufficient reason to deny the writ.

CONCLUSION

We respectfully submit that the petition for certiorari should be denied. Alternatively, if granted, it should be called up for argument and briefs and not acted upon as requested by petitioner.

Respectfully submitted,

PHILIP H. MECOM

LEROY H. SCOTT, JR.
GEORGE J. DESPOT
H. DAN SAWYER
Second Floor
Louisiana Bank Building
Shreveport, Louisiana

MECOM, SCOTT & DESPOT
Of Counsel

APPENDIX

Louisiana Code of Practice, Articles 911, 912

911. Judgments of Supreme Court — When become final — Petitions for rehearing.—Judgment rendered in the Supreme Court of the State shall become final and executory on the fifteenth calendar day after rendition, in term time and out of term time, unless the last day shall fall on a legal holiday when the delay shall be extended to the first day thereafter not a legal holiday; provided, that in the interval parties in interest shall have the right to apply for rehearing; provided further, in the recess of the court, the court shall have the right to dispose, at chambers, of applications for rehearing.

912. Petition for rehearing.—In the interval between the day on which the judgment is rendered and that on which it becomes final, a party dissatisfied with the judgment may apply to the court for a new hearing in the cause, and for this purpose shall present a petition, in which he shall state substantially the reasons for which he thinks the judgment erroneous, and shall cite the authorities in support of his opinion.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 805

DULIEN STEEL PRODUCTS, INC., *Petitioner,*

v.

ELBERT B. CONNELL, *Respondent.*

PETITIONER'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

I. JURISDICTION OF THIS COURT IS PROPERLY INVOKED

Respondent has challenged the jurisdiction of this Court to grant the writ of certiorari. That such challenge is without merit is readily apparent from the following brief discussion.

This Court's jurisdiction is invoked under 28 U.S.C. 1257 which states in pertinent part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . .
>
> * * *
>
> (3) By writ of certiorari . . . where any right . . . is specially set up or claimed under the . . . statutes of . . . the United States."

This action is brought pursuant to the Fair Labor Standards Act of 1938, as amended. (R. 4) Without said federal statute, respondent would have no basis for his action. He was not claiming a common law right nor a right based upon the laws of Louisiana. His only basis for a claim against petitioner was under a statute of the United States,—Sec. 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216 (b)).

Respondent's assertion that no federal statute is involved because a disputed question of fact was the primary issue below is without merit. Two "sleeping time" cases previously decided by this Court (*Armour & Co.* v. *Wantock,* 323 U.S. 126 (1944); *Skidmore* v. *Swift & Co.,* 323 U.S. 134 (1944), clearly belie this contention because jurisdiction in those cases, as here, was based on the matter in controversy arising under the laws of the United States (28 U.S.C. 1331). And cases such as *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697 (1944); *J. F. Fitzgerald Constr. Co.* v. *Pederson,* 324 U.S. 720 (1944) which were writs of certiorari to state courts, confirm this Court's jurisdiction.

As this Court said in an analogous situation in *Garrett* v. *Moore-McCormack Co.,* 317 U.S. 239, 245-246 (1942):

". . . in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so raises a federal question reviewable here under § 237(b) of the Judicial Code, 28 U.S.C. § 344(b)."

This Court's jurisdiction is clear.

Properly stated, respondent's opposition to the petition for a writ of certiorari is that this Court should not exercise its discretion in granting the writ because the question presented was not decided by the Trial Judge and was raised in the Supreme Court of Louisiana by motion to remand and recall the decree. No serious question is raised concerning the jurisdiction of the Supreme Court of Louisiana to consider the motion or that it did not consider it. The only authority cited for the state court's supposed lack of jurisdiction (*D'Apremont* v. *Peytavin,* 5 Mart. (O.S.) 641 (1818)) is so patently different from the instant case that it could not conceivably have deterred the court.

Unlike the *D'Apremont* case, of which full disposition had been made by the Louisiana Supreme Court more than six months prior to its consideration of defendant's motion to retax costs, the motion in the instant case was filed 10 days after the Supreme Court of Louisiana had acted, while the parties were still before the Court and before any attempt ever had been made to execute on the judgment. (*Louisiana Code of Practice,* Article 911) As a consequence, the cited case offers no precedent at all for denying the court's power to correct the judgment in the circumstances of the case at bar, where the motion was filed as soon as the unwitting error of counsel was discovered and

where the resulting judgment is what is tantamount to a penalty of more than ten times the additional compensation for which petitioner is legally indebted to respondent.

In any event, this contention is but one factor which this Court should consider in determining whether to exercise its certiorari jurisdiction. Other factors which are highly persuasive and should be decisive are that the judgment below is clearly contrary to the decisions of this Court in *Overnight Motor Transp. Co.* v. *Missel,* 316 U.S. 572 (1941) and *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697 (1944), and the failure to follow these cases has resulted in an unconscionable judgment against petitioner which this Court in the interest of justice ought to correct. Nowhere in his Brief in Opposition does respondent answer these arguments. At no place does respondent contend that the controlling Supreme Court decisions were followed or that the judgment below is correct. His silence fortifies the conclusion that this case is one where the Court should grant the writ of certiorari to bring the judgment below in line with its prior decisions and correct the serious injustice which has been done.

II. SUMMARY REVERSAL AND REMAND IS PROPER

Under the circumstances, summary reversal is proper upon granting the writ of certiorari in this case. Respondent's argument to the contrary (Resp. Br., pp. 8-11) is without foundation. (The succeeding paragraphs have been numbered to correspond to Respondent's alternative argument.)

First. The stipulation at the trial (R. 141) only settled that respondent's "actual working time" was

thirty hours. Obviously, it did not settle the number of hours for which he was employed, because if it had, there would have been no reason to continue the trial. Such a stipulation would have concluded the issue and there would have been no reason for the trial judge to determine the matter.

Second. The contractual provision referred to is the Eight Hour Day standard contract clause. It was not invoked by respondent in his complaint (R. 4), nor could it have been since by its terms it is applicable only to laborers and mechanics and not to watchmen. *Gordon* v. *U. S.*, 31 Ct. Cl. 254 (1896), 26 Ops. Atty. Gen. 622 (1908), *id* 604. Finally, the only rights conferred by the provision are for the United States.

Third. There is no inconsistency between the petition for a writ of certiorari and the position of petitioner below. Petitioner argued that respondent was not entitled to any additional compensation for the time he spent sleeping on petitioner's premises. Petitioner is not challenging the decision of the Supreme Court of Louisiana in this regard. Petitioner is only challenging the amount the courts below have held respondent should recover, because this amount is computed in a manner clearly contrary to the prior decisions of the Supreme Court of the United States.

Fourth. In seeking summary reversal, petitioner is not asking this Court to determine the amount of respondent's recovery, nor is petitioner seeking to foreclose any arguments repondent may wish to advance in that regard. Petitioner is merely asking for summary reversal and "remand with instructions to recompute the judgment in conformity with the decisions of this Court." (Pet. p. 7) Since the judgment below is clearly contrary to the controlling decisions of

this Court (which respondent apparently concedes), summary reversal is proper.

Fifth. It is significant that respondent does not challenge petitioner's assertion that the stipulation is the product of mistake which resulted in an unconscionable penalty. Indeed, the respondent tacitly concedes this error, his only explanation or comment being "The record is totally devoid of information showing how the computation was made". It is elementary that any agreement including a stipulation of the kind in the case at bar is void if based on mutual mistake.

III. CONCLUSION

For the foregoing reasons and those contained in the Petition for Writ of Certiorari, the writ should issue and the cause should be remanded with instructions to recompute the judgment in conformity with the decisions of this Court.

IRWIN GEIGER
PAUL R. HARMEL
MICHAEL A. SCHUCHAT
Attorneys for Petitioner

GEIGER AND HARMEL,
Of Counsel

April 26, 1956.